

Message Text

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TO USMISSION GENEVA

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TAGS: SHUM, UNHRC

SUBJECT: HUMAN RIGHTS COMMISSION - TORTURE

REFS: A. STATE 37067; 0. GENEVA 02447

1. DEPT APPRECIATES COMMENTS REFTEL 0 AND IS PROVIDING
GUIDANCE ON VARIOUS QUESTIONS RAISED THERE. CERTAIN
ISSUES REQUIRE CONSULTATION WITH DEPT OF JUSTICE (DOJ)
AND DEPT WILL PROVIDE FURTHER GUIDANCE ON THESE ISSUES
ASAP. FOLLOWING COMMENTS ARE KEYED TO PARAS OF GENEVA
02447.

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2. 5(A) TERM PUBLIC OFFICIAL SEEMS SUFFICIENTLY PRECISE
IN THIS CONTEXT. HOWEVER, DEL MAY WISH TO INFORMALLY
DISCUSS WHETHER PHRASE "AT THE INSTIGATION OF" GOES FAR
ENOUGH SINCE IT WILL NOT REACH SITUATION WHERE OFF-DUTY
OFFICIALS OR NON-OFFICIALS TORTURE AT THEIR OWN INSTIGA-
TION BUT ARE NOT SUBSEQUENTLY PROCEEDED AGAINST BY THE

GOVERNMENT. IT IS POSSIBLE THAT THIS SITUATION WOULD BE COVERED BY PHRASE "CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT" BUT COVERAGE IS NOT CERTAIN BECAUSE THIS PHRASE IS NOT DEFINED. INCORPORATION OF ART III(C) EXPERTS DRAFT AS SUGGESTED REFTTEL A WILL NOT SOLVE PROBLEM SINCE IT INCORPORATES LIMITED DEFINITION OF TORTURE. DEPT SUGGESTS THAT DEFINITION BE AMENDED TO READ "INFLICTED BY ANYONE"

THEREBY PROHIBITING ALL TORTURE. PUBLIC OFFICIALS WOULD STILL HAVE SPECIAL RESPONSIBILITIES AND LIABILITIES UNDER ART 12 SWEDISH DRAFT AND ART III(C) EXPERTS DRAFT. GENOCIDE CONVENTION NOT LIMITED BY PHRASE "INSTIGATION OF PUBLIC OFFICIALS" AND SINCE TORTURE IS ALSO HEINOUS CRIME DEPT WOULD PREFER BROADER DEFINITION. IF USDEL ENCOUNTERS SUBSTANTIAL RESISTANCE, DEPT COULD ACCEPT DEFINITION ALONG LINES OF "INFLICTED BY OR WITH THE ACTUAL CONSENT OR ACQUIESCENCE OF A PUBLIC OFFICIAL" WHICH WOULD REACH SITUATION DESCRIBED WHERE PUBLIC OFFICIAL DID NOT ACT TO PREVENT TORTURE. DEPT ASSUMES ART 1(2) IS INTENDED TO EMPHASIZE THE DISTINCTION BETWEEN TORTURE AND CRUEL, INHUMAN DEGRADING TREATMENT OR PUNISHMENT. THEREFORE ONLY TORTURE AS DEFINED IN ART 1(1) IS COVERED BY ARTS 7 AND 17.

3. 5(A) REFERENCE TO STANDARD MINIMUM RULES IN ART 1(1); CAPITAL PUNISHMENT, FLOGGING, DISMEMBERMENT. DEPT LIMITED OFFICIAL USE

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BELIEVES REFERENCE TO STANDARD MINIMUM RULES IS USEFUL ALTHOUGH, TORTURE CONVENTION SHOULD CITE DOCUMENT (ECOSOC RES 663 (XXIV)(C) INCORPORATING BY REFERENCE A/CONF/6/1, ANNEX I,A). LEGISLATIVE HISTORY OF TORTURE CONVENTION WILL BOLSTER LOGICAL CONCLUSION THAT SUCH A REFERENCE IS NOT INTENDED TO MAKE ALL DEROGATIONS FROM THE STANDARD MINIMUM RULES TORTURE. ALTHOUGH CAPITAL PUNISHMENT, FLOGGING AND DISMEMBERMENT COULD ARGUABLY FALL WITHIN PURVIEW OF CONVENTION, AS PRACTICAL MATTER, CAPITAL PUNISHMENT SHOULD POSE NO PROBLEM FOR US SINCE MAJORITY OF COUNTRIES ALSO HAVE THIS INSTITUTION AND WOULD THEREFORE NOT RAISE THE ISSUE.

4. 5(0) DEPT SUPPORTS EXPERTS ART III(C) BUT NOTES THAT IMPLEMENTING LEGISLATION WOULD BE NECESSARY TO ESTABLISH CRIMINAL LIABILITY UNDER US LAW AND WILL DISCUSS THIS WITH DOJ.

5. 5(C) EXCEPTIONAL CIRCUMSTANCES OR COERCION AS JUSTIFICATION. ARTS 2(2) AND 2(3) CLEARLY PROHIBIT THESE AS JUSTIFICATION FOR TORTURE BUT DO NOT RULE OUT CONSIDERATION OF THESE FACTORS ON QUESTION OF MITIGATION OF PUNISHMENT.

DEPT SUPPORTS THIS FLEXIBILITY WHICH MIGHT BE BETTER INSURED BY REPLACING THE WORD "WHETHER" IN ART 2(2) WITH THE PHRASE "SUCH AS". QUESTION OF CONSISTENCY OF ARTS 2 AND 3 WITH NUREMBURG CHARTER AND LAWS OF WAR REMAINS UNDER STUDY. NO INCONSISTENCY IMMEDIATELY APPARENT.

6. 5(D) DISSEMINATION OF INFORMATION AND SYSTEMATIC REVIEW UNDER ARTS 5 AND 6. SINCE FEDERAL-STATE PROBLEMS ARE POSSIBLE, DEPT INITIATING CONSULTATIONS WITH DOJ. USDEL SHOULD TRY TO INSERT LANGUAGE SUCH AS "EACH STATE WILL MAKE REASONABLE EFFORTS TO . . .". HOWEVER, IN CASE OF REAL PROBLEMS, RESERVATION ROUTE POSSIBLE.

7. 5(E) COMPENSATING VICTIMS. IMPLEMENTING LEGISLATION LIMITED OFFICIAL USE

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WOULD SEEM SUFFICIENT TO GIVE VICTIM RIGHT TO COMPENSATION FROM USG, HOWEVER MATTER MUST BE DISCUSSED WITH DOJ AND OMB.

8. 5(F) EVIDENCE OBTAINED BY TORTURE. DEPT PREFERS, ART VII EXPERTS DRAFT AS EXPLAINED REFTEL A BUT CONSULTATION PENDING WITH DOJ.

9. 5(G) USE OF HUMAN RIGHTS COMMITTEE CREATED UNDER CIVIL AND POLITICAL CONVENTION. DEPT FEELS NEED TO KNOW MORE ABOUT THINKING (ESPECIALLY SWEDISH) REGARDING ROLE OF HRC UNDER TORTURE CONVENTION. AGREE THAT IF HRC COMPETENT TO RECEIVE REPORTS ON OR FROM PARTIES TO TORTURE CONVENTION (TC) WHO ARE NOT PARTIES TO CIVIL AND POLITICAL CONVENTION (C&PC), THERE IS NO LEGAL OBSTACLE IF PARTIES TO TC AGREE THAT IT SHOULD RECEIVE THEM. THERE MIGHT BE POLITICAL OR POLICY DIFFICULTIES OUT IN ORDER BETTER TO ADDRESS SUCH QUESTIONS, DEPT WISHES TO REACH FULLER UNDERSTANDING OF QUESTIONS OF COMPETENCE OF HRC. FOR THIS REASON IT SUGGESTS EXPLORATION WITH SWEDISH DEL OF FOLLOWING LEGAL QUESTIONS AND ANY OTHERS US DEL SEES AS RELEVANT: (1) DOES HRC HAVE COMPETENCE (SEE ART 28(1), C&P) TO REQUEST STATES WHO ARE PARTIES TO THE TC BUT NOT TO THE C&PC, TO REPORT ON THEIR PERFORMANCE RESPECTING TC OBLIGATIONS, IN ACCORDANCE WITH ART 16 TC? (2) DOES ART 17 TC EFFECTIVELY CONFER UPON THE HRC THE FUNCTION OF RECEIVING AND ACTING UPON REPORTS BY NGO'S OF TORTURE IN STATES PARTY TO THE TC BUT NOT THE C&PC OPTIONAL PROTOCOL? (3) MIGHT A GENERAL ASSEMBLY RESOLUTION APPROVING THE TC AMOUNT TO CONFERRING THE REQUISITE COMPETENCE BY GIVING HRC ADDITIONAL STATUS AND FUNCTIONS OF A SUBSIDIARY ORGAN (ART 22 UN CHARTER) TO ACT WITH RESPECT TO TC AND ITS PARTIES? OR IS AMENDMENT OF C&PC WHAT DRAFTERS OF TC HAVE LIMITED OFFICIAL USE

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IN MIND? IF 2/3 PARTIES TO C&PC BECOME PARTIES TO TC,
FOLLOWING UPON GA APPROVAL OF TC, SHOULD AN AMENDMENT
OF C&PC BE CONSIDERED ACCOMPLISHED, PURSUANT TO ART 51
OF C&PC? WOULD IT MATTER THAT UNDER ART 51(3) PARTIES
TO C&PC NOT PARTIES TO TC WERE NOT BOUND BY THE AMENDMENT?

(4) OTHER POSSIBILITY IS THAT HRC DOES NOT NEED FORMAL
GRANT OF JURISDICTION SINCE TC BY ITS TERMS ONLY GIVES
HRC JURISDICTION OVER STATE PARTIES WHO AGREE TO IT,
AND ONLY POSSIBLE OBJECTORS TO GIVING HRC SUCH ADDITIONAL
JURISDICTION MIGHT BE STATES PARTY TO C&PC BUT NOT TC.
DEPT, HOWEVER, WORRIED THAT SOME STATES NOT PARTY TO
C&PC WOULD USE THIS AS PRETEXT TO AVOID SIGNING TC.
POTENTIAL PROBLEM STATES INCLUDE: VIETNAM, SOUTH AFRICA,
ETHIOPIA, GUATEMALA, NICARAGUA, PARAGUAY, TURKEY, ALBANIA,
CAMBODIA, LAOS, BURUNDI, UGANDA, PRSY, EQ. GUINEA.

10. 5(H) EXTRADITION. DEPT ONLY FAVORS EXTRADITION TO
THE EXTENT THAT DEPT BELIEVES OPPORTUNITY FOR FAIR TRIAL
IS BETTER IN JURISDICTION WITH NEXUS TO CRIME. DEPT
DOES NOT BELIEVE PARA 7 REFTTEL A REQUIRES EXTRADITION.
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